

THE MARK O. HATFIELD

COURTHOUSE NEWS

A Summary of Topical Highlights from decisions of the
U.S. District Court for the District of Oregon
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Creditor Law

Plaintiffs who purchased personal lines of insurance sought to maintain a class action alleging violations of the Federal Fair Credit Reporting Act (FCRA). Plaintiffs claimed that defendant adversely used information taken from their credit reports without proper notification. In an earlier opinion, Judge Anna J. Brown denied a defense motion for summary judgment on the issue of the adequacy of the notice. Defendant then filed a renewed motion for summary judgment because it is not an "insurer" and because it took no adverse action against any of the plaintiffs as an insurer. Judge Brown agreed and held that where the defendant acted as an "attorney-in-fact" for an insurance company, providing management services for the sale and issuance of insurance policies, it did not fall within the FCRA's coverage either directly, as an agent for the insurer, or as a "joint user" of a consumer credit report. Ashby v. Farmers Group, Inc., CV 01-1446-BR (Opinion, Feb. 20, 2003).

Plaintiffs' Counsel:

N. Robert Stoll

Charles A. Ringo
Defense Counsel:
Barnes H. Ellis

Employment

A train conductor who suffered on the job neck and shoulder injuries was denied medical leave and terminated. He filed a Bureau of Labor and Industries (BOLI) complaint and was later reinstated. Plaintiff then filed an action claiming retaliation in violation of the Oregon Family Leave Act (OFLA), the federal Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA) and Oregon's Whistleblower law.

Judge Dennis J. Hubel held that there is no state law cause of action for leave act retaliation under the OFLA; unlike the federal act, there is no express remedy in the statute. The court rejected plaintiff's argument that an Oregon Administrative Rule prohibiting leave retaliation could be relied upon to expand the OFLA's coverage. On the federal leave act claim, Judge Hubel denied a defense motion

for summary judgment noting that genuine factual issues existed relative to causation and pretext.

Judge Hubel granted a defense motion for summary judgment against plaintiff's ADA retaliation claim, finding no evidence to support a prima facie case. The court also rejected plaintiff's ORS 659 retaliation claims based upon the absence of any evidence that plaintiff suffered an adverse employment action by virtue of defendant's requirement that plaintiff undergo a series of efficiency tests. Judge Hubel determined that those tests had no effect on plaintiff's employment.

In considering defendant's motion for summary judgment, Judge Hubel denied a motion to strike references to unpublished local district court opinions, noting the absence of any rule prohibiting the practice.

Finally, the court granted plaintiff's motion for partial summary judgment on his claim that he was wrongfully denied medical leave. Judge Hubel held that the statute's prior written notice requirements do not apply when an employee suffers from an

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unexpected and serious health condition. The court further held that the defendant unjustifiably restricted plaintiff's leave to chiropractic treatment. Denny v. Union Pacific Railroad, CV 00-1301-HU (F & R, Oct. 31, 2002; Adopted by Amended Order of Judge Jones, Jan. 30, 2003).

Plaintiff's Counsel:

Paul S. Bovarnick

Defense Counsel:

Emi A. Murphy

Insurance

An ERISA Plan Administrator filed an action against the recipient of a wrongful death settlement seeking a constructive trust against a portion of the settlement proceeds. The decedent had been injured by the alleged negligence of a third party and incurred over \$100,000 in medical expenses covered by the plaintiff. Upon her death, her estate filed an action against the allegedly negligent party and the action was settled for over \$200,000. Although the decedent's ERISA plan included a 3rd Party Liability and Subrogation clause, defendant argued that plaintiff should not be entitled to reimbursement since the plan did not expressly reference wrongful death settlements and/or because the plan's definition of "bodily injury" was limited to unintentional injuries.

On cross-motions for summary judgment, Judge Ann Aiken held that the plan language was clear, unambiguous and extremely broad. The court granted plaintiff's motion for summary judgment, holding that the plan's reimbursement language was broad enough to cover the wrongful death settlement. The court also held that the plaintiff's prayer for a constructive trust against the settlement proceeds was appropriate equitable relief under ERISA. Judge Aiken rejected defendant's argument that imposition of a constructive trust required some evidence of wrong doing or "ill-gotten gain." Providence Health Plan v. Washington, CV 02-6233 (Opinion, March 13, 2003).

Plaintiff's Counsel:

Arden J. Olson

Defense Counsel:

J. Michael Alexander

Contracts

A contractor filed an action against a municipality seeking to recover money owed for the construction of a wastewater treatment project. The City filed a counterclaim for delay damages. Plaintiff moved for partial summary judgment against application of a liquidated damage clause

included in the contract. The clause called for \$600/day and the City sought \$115,000 for a 192 day delay. Judge John Jelderks noted that Oregon courts look to the factors set forth in ORS 72.7180 for guidance in assessing the validity of liquidated damage clauses outside of the sale of goods context. Applying those factors, the court held that the clause challenged was unreasonable as a matter of law. The court was primarily concerned with the fact that the City's actual damages attributable to the delay were only approximately \$13,000; Judge Jelderks concluded that to enforce the provision would result in a penalty for the plaintiff and a windfall to the defendant. Accordingly, the court granted plaintiff's motion for partial summary judgment and held that the clause was unenforceable. Stellar J Corp. v. City of Hood River, CV 02-73-JE (F & R, Jan. 9, 2003; Adopted by Judge Jones, March 3, 2003).

Plaintiff's Counsel:

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Defense Counsel:

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